

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION

THE HOME INSURANCE COMPANY,  
Plaintiff

V.

NO. 3:93CV9-B-D

WEBSTER COUNTY, MISSISSIPPI;  
BILL MIDDLETON, SHERIFF OF  
WEBSTER COUNTY, MISSISSIPPI; and  
OWEN DENTON, DEPUTY SHERIFF OF  
WEBSTER COUNTY, MISSISSIPPI,  
Defendants

**MEMORANDUM OPINION**

This cause comes before the court upon cross-motions for summary judgment filed by all parties, as well as the motion to strike filed by the plaintiff, The Home Insurance Company. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

**INTRODUCTION**

Michael Childress filed an action in the United States District Court for the Northern District of Mississippi against the defendants herein, alleging that Sheriff Middleton and Deputy Sheriff Denton assaulted him with a slapjack after having arrested him for DUI. The defendants submitted the claim to their insurance carrier, the plaintiff herein, for defense and indemnification. The plaintiff denied coverage under the policy and filed this action for a declaratory judgment. The defendants counterclaimed

for the cost of defense and reimbursement of the ultimate \$20,000.00 settlement of the underlying action.<sup>1</sup>

### **FACTS**

The plaintiff, The Home Insurance Company, issued a police professional liability insurance policy to the Webster County Sheriff's Department, covering bodily injury and personal injury, subject to certain exclusions. The policy defined "bodily injury" as:

bodily injury, sickness, or disease sustained by any person accidentally caused by any act of the insured in making or attempting to make an arrest while acting within the scope of his duties as a law enforcement officer.

(Emphasis added.) "Personal injury" is defined in the policy as:

false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, violation of property rights and, if committed while making or attempting to make an arrest or while resisting an overt attempt to escape by a person under arrest before such person has been or could have been brought before a magistrate or like official authorized to hold a preliminary hearing, assault and battery, provided that no act shall be deemed to be or result in personal injury unless committed in the regular course of duty by the insured.

(Emphasis added.) The policy further contained the following exclusion:

This policy does not apply:

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<sup>1</sup> Although not formally delineated as a counterclaim, the defendants' answer asks that this court find the plaintiff liable for the cost of the defense and settlement of the underlying action.

(f) To bodily injury to any person occurring while such person is in the custody of the insured or any municipal, state or federal authority.

(Emphasis added.)

On February 22, 1990, Michael Childress was driving his pickup truck in Webster County when the truck got stuck in a ditch. His brother and sister were following behind him and they stopped to help pull him out. While they were attempting to free the truck, Sheriff Middleton and Deputy Denton arrived on the scene. Childress was allegedly yelling and cursing, and appeared to be drunk, so the Sheriff decided to arrest him for DUI. Childress attempted to run, but was tackled by his brother. The Sheriff then handcuffed Childress and placed him in the rear seat of the patrol car.

Childress' brother and sister left the scene, while Sheriff Middleton and Deputy Denton waited for the wrecker to arrive. Childress alleges that after he was placed in the rear of the patrol car, both Sheriff Middleton and Deputy Denton struck him in the face several times with a slapjack. Childress further alleges that he was denied medical treatment upon request after he had been placed in jail.

On February 20, 1991, Childress filed a complaint in the United States District Court for the Northern District of Mississippi, against Sheriff Middleton, Deputy Denton, and Webster County, Mississippi, seeking damages for the alleged assault and battery in the patrol car and the denial of medical treatment. Childress' complaint unequivocally alleged that the assault and

battery occurred after he had been handcuffed and placed in the rear of the patrol car, and after his brother and sister had left the scene. The defendants notified The Home Insurance Company of the lawsuit and requested that Home provide a defense and pay any settlement or judgment rendered against them. The Home Insurance Company denied coverage under the policy, and brought this declaratory judgment action. Webster County subsequently settled the Childress lawsuit for \$20,000.00.

#### **LAW**

The defendants allege that the terms of the insurance policy are ambiguous, thus mandating coverage of the Childress allegations. It is well settled that ambiguities in an insurance policy are to be construed against the drafter and in favor of the insured. Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984). Equally well settled is that ambiguities should not be created where none exist. Brander v. Nabors, 443 F. Supp. 764, 769 (N.D. Miss. 1978), aff'd, 579 F.2d 888 (5th Cir. 1978).

The insurance policy at issue is clear in terms of its coverage and exclusions. The alleged actions, being intentional, do not fall within the scope of the bodily injury coverage, which is limited to accidental injuries. Furthermore, the bodily injury coverage only applies to injuries that occur during an attempted arrest. Injuries that occur while a person is in custody of the authorities are specifically excluded. The alleged injuries in this action occurred after the arrest was completed, while Childress was in the rear of the patrol car awaiting transport to

jail. As such, the alleged injuries do not fall within the bounds of the bodily injury coverage.

Likewise, the alleged injuries do not fall within the purview of the personal injury coverage. Although assault and battery is listed under the definition of personal injury, it is only covered under the terms of the policy when it occurs during an arrest or an attempted escape. As stated, Childress alleges that he was assaulted after his arrest. He does not claim to have been attempting an escape. Furthermore, Childress' other claim, alleging denial of medical treatment, does not fall within the bounds of either the bodily injury or personal injury coverage.

Although the defendants argue otherwise, there is nothing ambiguous about the terms of the insurance policy. In the absence of an ambiguity, the policies must be construed as written. Lowery v. Guaranty Bank and Trust Co., 592 So. 2d 79, 82 (Miss. 1991); State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So. 2d 1371, 1374 (Miss. 1981).

The law is well settled that an insurer must defend an insured against all actions brought against him, for which the allegations give rise to coverage, even though the allegations may be groundless, false or fraudulent. E.E.O.C. v. Southern Publishing Co., 894 F.2d 785, 789 (5th Cir. 1990); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805, 808 (Miss. 1970). The insurer further has a duty to defend all actions in which the true facts, if known, would give rise to coverage, even though the allegations do not assert claims that fall within the terms of the policy.

Mavar Shrimp & Oyster Co. v. USF&G, 187 So. 2d 871, 874-75 (Miss. 1966). In this action, Childress' allegations unquestionably fall outside the scope of the insurance coverage. Furthermore, The Home Insurance Company thoroughly investigated the circumstances pertaining to the arrest and alleged assault of Childress, and determined that there were no facts which would indicate that Childress was injured in such a manner as would give rise to coverage. The defendants have failed to present any evidence which would tend to bring the circumstances of the arrest and alleged assault within the bounds of coverage.

The defendants have submitted an affidavit from Sheriff Middleton which asserts that the insurance agent who sold the policy to the Sheriff's department assured Sheriff Middleton that assault and battery was covered under the terms of the policy. The affidavit further states that the agent assured the Sheriff on two occasions after the Childress suit was filed that coverage existed under the policy. The plaintiff has filed a motion to strike the affidavit as being untimely, since the defendant filed the affidavit with his rebuttal brief. The court finds that the plaintiff's motion to strike should be denied; however, the defendants' affidavit is not persuasive. Assault and battery is covered under the terms of the policy, subject to certain limitations. The affidavit fails to state that the agent promised coverage for assault and battery arising out of the facts alleged herein.

### CONCLUSION

For the foregoing reasons, the court finds that the insurance policy at issue did not provide coverage for the allegations in the Childress complaint and that, therefore, judgment should be entered in favor of the plaintiff.

An order will issue accordingly.

THIS, the \_\_\_\_\_ day of August, 1995.

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NEAL B. BIGGERS, JR.  
UNITED STATES DISTRICT JUDGE